

**INTERNATIONAL CONTAINER TERMINAL SERVICES, INC.,
PETITIONER, VS. THE HON. COURT OF APPEALS, HON. EDILBERTO G.
SANDOVAL, PRESIDING JUDGE OF BRANCH IX, REGIONAL TRIAL
COURT, NATIO...**

G.R. No. 90530. October 07, 1992

Ponente: CRUZ, J.

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CRUZ, J.:

What is the effect of the dismissal of a complaint ordered at the instance of the defendant upon a compulsory counterclaim duly raised in its answer?

On February 10, 1988, Sharp Inc., the herein private respondent filed a complaint for prohibition with prayer for preliminary injunction against the Secretary of Transportation and Communications, the Philippine Ports Authority (PPA), E. Razon, Inc., and the International Container Terminal Services Inc., the herein petitioner. The complaint was docketed as Civil Case No. 88-43616 in the Regional Trial Court of Manila, Branch 9.

On March 7, 1988, the trial court issued a writ of preliminary injunction upon the posting by Sharp of a bond issued by the Integrated Bonding and Insurance Co. in the sum of P10,000,000.00

On that same day, the petitioner filed an answer with a compulsory counterclaim against Sharp for its "unfounded and frivolous action." The petitioner claimed that as a consequence of the complaint and the writ of preliminary injunction, it had suffered injuries which "if monetized (would) amount to more than P100,000,000.00."

On March 17, 1988, the writ of preliminary injunction was nullified by this Court in G.R. No. 82218. We held that Sharp was not a proper party to stop the negotiation and awarding of the contract for the development, management and operation of the Container Terminal at the Port of Manila. Moreover, the petition was premature because Sharp had not exhausted the administrative remedies open to it from "the PPA, the Bidding Committee, and the Office of the President."

On March 25, 1988, the PPA, taking its cue from this decision, filed a motion to dismiss Sharp's complaint on the above-stated grounds. This motion was adopted by petitioner CCTSI in a manifestation dated April 8, 1988.

On July 13, 1988, Judge Edilberto G. Sandoval dismissed the complaint as well as the counterclaim.

On August 13, 1988, CCTSI filed a motion for reconsideration of the order insofar as it dismissed its counterclaim. Meanwhile, it gave notice to the First Integrated Bonding and Insurance Co., Inc. that it was claiming damages against Sharp for the revoked injunction.

On November 10, 1988, the motion for reconsideration was denied. The trial court declared in part:

x x x indeed a compulsory counterclaim by the nature of its nomenclature arises out of or is so intertwined with the transaction or occurrence that is the subject matter of the complaint so that by the dismissal of the latter, the same has to be discarded, specially since the complaint was dismissed without any trial.

The dismissal of the counterclaim was appealed to the respondent court, which upheld the lower court on the following justifications:

- (1) Compulsory counterclaims for actual damages are not the claims recoverable against the bond.
- (2) Petitioner's manifestation adopting Philippine Ports Authority's motion to dismiss did not contain any reservation. Hence, Sec. 2, Rule 17 of the Rules of Court will not apply. The counterclaim for damages being compulsory in nature, for which no filing fee has been paid, was correctly dismissed.
- (3) Sec. 20 of Rule 57 of the Rules of Court specifically provides that "such damages (recoverable against the bond) may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial x x x, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.

The application contemplated in Sec. 20 is distinct and separate from the compulsory counterclaim asserted in the answer.

- (4) The filing in court of a claim against the injunction bond, with copy thereof being furnished the surety, was not sufficient notice to the latter of an application against it under this bond.

CCTSI has filed the present petition for review alleging that the order of the trial court dismissing the counterclaim was issued with grave abuse of discretion. Specifically, the petitioner contends that the respondent court erred in sustaining the said order because:

- (1) Dismissal of the complaint upon defendant's motion did not necessarily entail dismissal of defendant's compulsory counterclaim.
- (2) A claim for damages arising from a wrongfully obtained injunction may be made in a counterclaim.
- (3) There is no rule requiring a particular form of notice to the surety of petitioner's claim against the injunction bond.

For its part, the private respondent argues that the dismissal of the compulsory counterclaim should be sustained because:

- (1) The dismissal of the complaint upon petitioner's motion necessarily entailed the dismissal of the compulsory counterclaim.
 - (2) The compulsory counterclaim raised by petitioner in its answer did not partake of the nature of a claim for damages against the injunction bond.
 - (3) The notice given by the petitioner to the surety was fatally defective and did not comply with the requirements of the Rules of Court
- d. Appeal, not certiorari, was the proper remedy of petitioner.

The Court gave due course to this petition and required the parties to submit simultaneous memoranda. After studying their respective arguments and the pertinent law and jurisprudence, we have come to the conclusion that the petition cannot prosper.

The counterclaim for damages alleged that the delay in the award of the MICT contract caused by Sharp's complaint and writ of preliminary injunction jeopardized the petitioner's timetable to attain the projected volumes in its winning bid and, as well, caused it to incur litigation expenses, including attorney's fees.

We have consistently held that a counterclaim is compulsory where: (1) it arises out of, or is necessarily

connected with, the transaction or occurrence that is the subject matter of the opposing party's claim; (2) it does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; and (3) the court has jurisdiction to entertain the claim.[1]

Tested by these requirements, the petitioner's counterclaim was clearly compulsory. The petitioner itself so denominated it. There is no doubt that the same evidence needed to sustain it would also refute the cause of action alleged in the private respondent's complaint; in other words, the counterclaim would succeed only if the complaint did not. It is obvious from the very nature of the counterclaim that it could not remain pending for independent adjudication, that is without adjudication by the court of the complaint itself on which the counterclaim was based.

Rule 17, Sec. 2 of the Rules of Court provides:

Sec. 2. Dismissal by order of the court. - Except as provided in the preceding section, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court may deem proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph shall be without prejudice.

The Court notes that, to begin with, the petitioner itself joined the PPA in moving for the dismissal of the complaint: or put passively, it did not object to the dismissal of the private respondent's complaint. Secondly, the compulsory counterclaim was so intertwined with the complaint that it could not remain pending for independent adjudication by the court after the dismissal of the complaint which had provoked the counterclaim in the first place. As a consequence, the dismissal of the complaint (on the petitioner's own motion) operated to also dismiss the counterclaim questioning that complaint.

The petitioner is correct in contending that the claim for damages caused by the wrongful issuance of a preliminary injunction can be made in the form of a counterclaim. As we held in *Raymundo vs. Carpio*: [2]

It would seem that the proper practice to be followed in cases where it is desired to obtain damages by reason of the wrongful issuance of an attachment in favor of plaintiff that an issue would be tendered on the subject by the defendant in his answer in the main case. Such a tender would present the question squarely in that court, and the parties having offered their evidence on the subject, the trial court could dispose of it along with the principal action. It is not necessary that the defendant wait until it is determined by a final decision in the main action that the plaintiff is not entitled to recover in order to present the question of his right to damages. All questions which are material to the main action or which are incidental thereto but depending thereon should be presented and litigated at the same time with the main action, so as to avoid the necessity of subsequent litigation and consequent loss of time and money.

However, there is no glossing away the fact that it was the petitioner itself that caused the dismissal of its counterclaim when it not only did not object to, but actually moved for, the dismissal of the complaint. The petitioner cannot undo that act. If it wanted the counterclaim to subsist, it should have objected to the dismissal of the complaint or at least reserved its right to prosecute it, assuming this would still be possible. It did neither of these. The petitioner now claims that there is no law requiring that reservation, but there is no law presuming it either. The petitioner cannot simply say now that it intended all the time to preserve its counterclaim when it knew that under Rule 17, Sec. 2 "if a counterclaim has been pleaded by a defendant prior to the service upon him of a motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court."

The counterclaim was not permissive. A counterclaim is permissive if it does not arise out of nor is it necessarily

connected with the subject matter of the opposing party's claim. It is not barred even if not set up in the action.[3] The petitioner's counterclaim was within the jurisdiction of the trial court. Most importantly, it had no independent existence, being merely ancillary to the main action.[4] The petitioner knew all this and did not object to the dismissal of the complaint. On the contrary, it actually moved to dismiss that main action, and in so doing also moved, in effect, for the dismissal of its counterclaim.

The Court can stop at this point. For clarification of certain issues raised by the parties, however, the following reminders are made.

The rules governing the application for damages against the surety bond posted in support of the application for a writ of preliminary attachment are also applicable by analogy to preliminary injunction. Sec. 20 of Rule 57 of the Rules of Court reads as follows:

Claim for damages on account of illegal attachment. – If the judgment on the action be in favor of the party against whom attachment was issued, he may recover, upon the bond given or deposit made by the attaching creditor, any damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.

If the judgment of the appellate court be favorable to the party against whom the attachment was issued, he must claim damages sustained during the pendency of the appeal by filing an application with notice to the party in whose favor the attachment was issued or his surety or sureties, before the judgment of the appellate court becomes executory. The appellate court may allow the application to be heard and decided by the trial court.

Interpreting this rule, the Court has laid down the following principles:

- (1) That damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety;
- (2) That if the surety is given such due notice, he is bound by the judgment that may be entered against the principal, and writ of execution may issue against said surety to enforce the obligation of the bond; and
- (3) That if no notice is given to the surety of the application for damages, the judgment that may be entered against the principal cannot be executed against the surety without giving the latter an opportunity to be heard as to the reality or reasonableness of the alleged damages. In such case, upon application of the prevailing party, the court must order the surety to show cause why the bond should not respond for the judgment for damages. If the surety should contest the reality or reasonableness of the damages claimed by the prevailing party, the court must set the application and answer for hearing. The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove.[5]

A long line of cases has held that these rules are mandatory and failure to observe them deprives the aggrieved party of the right to proceed against the surety bond.[6]

Due notice to the adverse party and its surety setting forth the facts supporting the applicant's right to damages and the amount thereof under the bond is indispensable. No judgment for damages may be entered and executed against the surety without giving it an opportunity to be heard as to the reality or reasonableness of the damages resulting from the wrongful issuance of the writ.

The herein petitioner contends that it complied with the requirements when it served the bonding company with

notice of its claim for damages on August 31, 1988. It is correct. No particular form for such notice is required. The rule also clearly says that the application for damages and the notice to the surety may be made at any time before the judgment becomes final and executory. CCTSI served the notice on the surety during the pendency of the motion for reconsideration, before the judgment dismissing the complaint and the counterclaim had become final and executory.

Had the counterclaim not been dismissed with the dismissal of the complaint, the petitioner could have introduced evidence to show that it was prejudiced by the filing of the complaint and the obtention of the writ of preliminary injunction by Sharp. But the petitioner itself aborted that effort when it joined PPA in moving for the dismissal of Sharp's complaint, knowing that it was the basis of its own compulsory counterclaim. For failing to object when it should have, to keep its counterclaim alive, and instead moving to dismiss the complaint from which the counterclaim derived its life, the petitioner must now bear the consequences of its own negligence.

WHEREFORE, the petition is DENIED, with costs against the petitioner. It is so ordered.

Griño-Aquino, Medialdea, and Bellosillo, JJ., concur.
Padilla, J., on leave.

[1] Javier vs. Intermediate Appellate Court, 171 SCRA 609.

[2] 33 Phil. 395.

[3] Lopez vs. Gloria, 40 Phil. 26.

[4] Francisco, The Revised Rules of Court in the Philippines, Vol. I, p. 479.

[5] Visayan Surety & Insurance Corp. vs. Pascual, 85 Phil. 779.

[6] Aguasin vs. Velasquez, 88 Phil. 357; Ponce Enrile vs. Capulong, 185 SCRA 504.

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